(2)

No. 88-1193

Supreme Court, U.S.
FILED
FEB 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

SOUTHWESTERN BELL TELEPHONE COMPANY,

Petitioner,

v.

CONTINENTAL CASUALTY COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL MINNIS*
DAVID MCCULLOUGH
MICHAEL MINNIS & ASSOCIATES, P.C.
1310 First Oklahoma Tower
210 West Park Avenue
Oklahoma City, OK 73102
(405) 235-7686

Attorneys for Continental Casualty Company

February 17, 1989

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

14p

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF THE CASE..... 1

REASONS FOR DENYING THE WRIT..... 1

PROPOSITION ONE: THE TENTH CIRCUIT OPINION IS CONSISTENT WITH THE SEVENTH AMENDMENT..... 3

PROPOSITION TWO: BELL'S LIABILITY TO CNA FOR TORTIOUS CONTRACTUAL INTERFERENCE IS NOT AN APPELLATE ISSUE..... 6

CONCLUSION..... 10

TABLE OF AUTHORITIES

Page

CASES:

Aetna Cas. & Sur. Co. v. Yeatts, 122 F.2d 350 (4th Cir. 1941) 4

Bennett v. Longacre, 774 F.2d 1024 (10th Cir. Okl. 1985) 6

Black v. Hieb's Enterprises, Inc., 805 F.2d 360 (10th Cir. 1986) 5, 6

Bonjorno v. Kaiser Aluminum & Chemical Corp., 752 F.2d 802 (3rd Cir. 1984) *cert. denied* 477 U.S. 908 (1986) 8

Brown v. Freedman Baking Co., 810 F.2d 6 (1st Cir. 1987) 4

Byrd v. Blue Ridge Rural Electric Cooperative, 356 U.S. 525, 78 S.Ct. 893, *reh. denied* 357 U.S. 933, 78 S.Ct. 1366 (1958) 5

C.A. May Marine Supply Co. v. Brunswick Corp., 649 F.2d 1049 (5th Cir.), *cert. denied* 454 U.S. 1125 (1981) 4

Capitol Traction Co. v. Hof, 174 U.S. 1, 19 S.Ct. 580 (1899) 4

Carr v. F.T.C., 302 F.2d 688 (1st Cir. 1962) 7

Continental Casualty Co. v. Southwestern Bell Telephone Co., 860 F.2d 970 (10th Cir. 1988) 2, 5, 6, 8

Dawson v. Andrus, 612 F.2d 1280 (10th Cir. 1980) 7

Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 51 S.Ct. 513 (1931) 9

Hudson v. Smith, 618 F.2d 642 (10th Cir. Okl. 1980) 5

Joan W. v. City of Chicago, 771 F.2d 1020 (7th Cir. 1985) 3

TABLE OF AUTHORITIES – Continued

Page

Morley Construction Co. v. Maryland Casualty Co., 300 U.S. 185 (1937) 7

National R.R. Passenger Corp. v. Koch Industries, Inc., 701 F.2d 108 (10th Cir. Okl. 1983) 8, 9

Rice v. Sioux City Memorial Park Cemetery, 749 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955) 1

Tidewater Oil Co. v. Waller, 302 F.2d 638 (10th Cir. Okl. 1962) 4

Trejo v. Denver & R.G.R. Co., 568 F.2d 181 (10th Cir. 1977) 10

United States v. Hess, 341 F.2d 444 (10th Cir. 1965) 5

Vidrine v. Kansas City Southern Ry. Co., 466 F.2d 1217 (5th Cir. 1972) 4

Watts v. United States, 220 F.2d 483 (10th Cir. 1955), *cert. denied* 349 U.S. 939 (1955) 6

OTHER:

Fed. R. Civ. P. 59(a) 9

Sup. Ct. R. 17.1 1

COUNTER-STATEMENT OF THE CASE

Southwestern Bell Telephone Company ("Bell") is the petitioner. Continental Casualty Company ("CNA") is the respondent.

CNA sued Bell for contractual interference. A jury returned a verdict for CNA that Bell had tortiously interfered with CNA's contracts and awarded damages to CNA. CNA moved for a new trial solely on the issue of damages. When this motion was denied, CNA appealed the damage award. Bell did not cross-appeal.

The Tenth Circuit found that the evidence did not support the damages awarded and reversed for a retrial on the damage issue only. In moving for a rehearing, Bell argued for the first time that Bell's liability for interfering with CNA's contracts should be retried. *"Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc"*, p. 9 (June 14, 1988).

When a rehearing was denied, Bell petitioned for certiorari asserting, for the first time, that a new trial on damages only was inconsistent with the Seventh Amendment to the U.S. Constitution.

REASONS FOR DENYING THE WRIT

A petition for writ of certiorari is granted "only when there are special and important reasons therefor". Sup. Ct. R. 17.1. *See also Rice v. Sioux City Memorial Park Cemetery*, 749 U.S. 70, 73-74, 75 S.Ct. 614, 99 L.Ed. 897 (1955). Bell has not posited any such "special and important" issue. The sole purported basis for seeking this writ is an

alleged conflict between the opinion below and the Seventh Amendment to the United States Constitution. Bell complains of two conflicts; neither is a "special and important" reason for reviewing the order below. Both arguments are premised on inaccurate or incomplete representations of the Tenth Circuit opinion and the law.

The first representation is that jury damage awards may only be disturbed if they shock the conscience of the appellate Court. *Petition for Writ of Certiorari*, p. 6. Bell contends the Tenth Circuit erred when it "weighed the evidence and reversed the trial judge on the ground that the verdict was against the weight of the evidence. (860 F.2d at 973)" *Petition for Writ of Certiorari*, p. 5. What the Tenth Circuit actually said was:

> But after study of the record, the Court has reached the inescapable conclusion that **the jury's damage award is clearly, decisively and overwhelmingly against the weight of the evidence**, such that **the trial judge abused his discretion in not granting a new trial**. At arriving at this result, the Court has considered each argument made by Southwestern Bell in support of the award and has found uncontroverted evidence to the contrary in the record.

Continental Casualty Co. v. Southwestern Bell Telephone Co., 860 F.2d 970, 973 (10th Cir. 1988) (emphasis added). In essence, the Tenth Circuit holding was based on a conclusion that the jury damage award was not supported by any evidence and the Trial Court abused its discretion in not granting a new trial on damages. In paraphrasing the Tenth Circuit, Bell omitted three adverbs ("clearly, decidedly and overwhelmingly") which imply much more than a mere weighing of the evidence.

Bell's second representation is that the Seventh Amendment was violated when the Tenth Circuit Court of Appeals remanded the case for new trial on the issue of damages only. Awarding a new trial on the issue of damages only does not violate the Seventh Amendment right to a jury trial. Further, Bell did not appeal the jury verdict that Bell had liability for tortious interference with CNA's contracts nor even argue that the liability verdict should be reversed until moving for a rehearing before the Tenth Circuit.

Because Bell's representations cannot withstand scrutiny, its subsequent arguments are without merit.

PROPOSITION ONE: THE TENTH CIRCUIT OPINION IS CONSISTENT WITH THE SEVENTH AMENDMENT.

Bell contends its Seventh Amendment right to a jury trial was violated when the Tenth Circuit reversed the jury award of damages without a finding that the award shocked "the conscience of the Court". *Petition for Writ of Certiorari*, p. 6. Bell argues that the Tenth Circuit opinion is inconsistent with the decisions of other circuit courts because the appeals court reversed the jury damage award without stating that it was shocked by the award.

Bell has simply erected a strawman (that reversal of a damage award *must* be based on a "shocked conscience") which it then proceeds to topple. Bell's own case citations undercut its false premise. *See e.g. Joan W. v. City of Chicago*, 771 F.2d 1020, 1023 (7th Cir. 1985) ("trial judges may vacate a jury verdict for excessiveness only if it is

'monstrously excessive' **or if there is 'no rational connection between the evidence on damages and the verdict' ").**[1] (emphasis added).

The Seventh Amendment provides that "no fact tried by a jury, shall be otherwise re-examined in any court of the United States, **than according to the rules of the common law.**" (emphasis added). At common law, a judge has the power "to set aside" a jury "verdict if in his opinion it is against the law or the evidence". *Capitol Traction Co. v. Hof*, 174 U.S. 1, 14, 19 S.Ct. 580, 585 (1899). Further, it has long been understood that if a trial judge is not satisfied with a jury verdict, he has the right – and indeed the duty – to set aside the verdict and order a new trial. *Aetna Cas. & Sur. Co. v. Yeatts*, 122 F.2d 350, 352-354 (4th Cir. 1941); *see also Tidewater Oil Co. v. Waller*, 302 F.2d 638, 643 (10th Cir. Okl. 1962).

---

[1] *See also Vidrine v. Kansas City Southern Ry. Co.*, 466 F.2d 1217, 1226 (5th Cir. 1972) ("When the amounts of the awards are considered in connection with the other evidence of illegality of the verdicts, we think that . . . the awards . . . was [sic] so grossly inadequate as to amount to legal error"); *Brown v. Freedman Baking Co.*, 810 F.2d 6, 12 (1st Cir. 1987) ("we will uphold it [jury verdict]" **"unless** the facts and inferences, when viewed in the light most favorable to the party to whom the jury held, points so strongly and overwhelmingly in favor of the movant that a reasonable jury could not have arrived at this conclusion") (emphasis added); *C.A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049, 1053 (5th Cir.), *cert. denied* 454 U.S. 1125 (1981) ("it is within the discretion of the trial judge to grant a new trial where the jury verdict is inadequate. A refusal to do is subject to reversal for abuse of discretion only **where the jury's verdict is without factual support in the record**") (emphasis added).

A finding that the damages awarded were "facially inadequate" "is a separate legal theory" from an "argument that the verdict was against the evidence". *Continental Casualty, supra* p. 973, *citing Black v. Hieb's Enterprises, Inc.*, 805 F.2d 360 (10th Cir. 1986). The "shocked conscience" test applies to a reversal based on the "facial inadequacy" theory, not to a reversal premised on a "clearly erroneous" damage award or one unsupported by the evidence. *Cf. Hudson v. Smith*, 618 F.2d 642, 646 (10th Cir. Okl. 1980). Here, the Panel did not find the damages to be so "inadequate" as to "shock" its conscience. *Continental Casualty, supra* p. 973. Rather, the damage award was reversed because the verdict was unsupported by the evidence. A new trial can be granted if a jury verdict is "against the weight of the evidence". *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525, 540, 78 S.Ct. 893, *reh. denied* 357 U.S. 933, 78 S.Ct. 1366 (1958); *United States v. Hess*, 341 F.2d 444, 448 (10th Cir. 1965) ("Insufficiency of the evidence is one of the common law grounds for . . . granting a motion for a new trial.").

As set out in *Black, supra* p. 363, a "trial court's decision to deny a motion for a new trial will stand absent a showing of a manifest abuse of discretion." The standard for finding such a manifest abuse is "whether the verdict is clearly, decidedly or overwhelmingly against the weight of evidence". *Id.* In reversing the jury damage award, the Tenth Circuit stated "the jury's damage award is clearly, decidedly and overwhelmingly against the weight of evidence, such that **the trial judge abused his discretion in not granting a new trial**." *Continental Casualty, supra* p. 973 (emphasis added). The

damage verdict reversal is essentially based on a *total lack of evidence* to support the amount awarded. *Continental Casualty, supra* pp. 973-975. Whether the verdict is supported by the evidence is a threshold appellate question. *See e.g. Black, supra* p. 363; *Bennett v. Longacre,* 774 F.2d 1024, 1028 (10th Cir. Okl. 1985). In answering this elementary appellate question, the Panel Opinion determined that *no* evidence in the record tended to sustain the amount of the jury damage verdict. *Continental Casualty, supra* pp. 973, 975.

In reviewing the evidence to ensure that the record supported the verdict, the Tenth Circuit came to the well-reasoned and indisputable conclusion that the evidentiary record did not support the jury damage award. The Tenth Circuit's conclusion and ruling are entirely consistent with the Seventh Amendment to the U.S. Constitution and accepted case law in the Tenth Circuit and all other circuits.

PROPOSITION TWO: BELL'S LIABILITY TO CNA FOR TORTIOUS CONTRACTUAL INTERFERENCE IS NOT AN APPELLATE ISSUE.

In seeking a reversal of the jury verdict that Bell tortiously interfered with CNA's contracts, Bell is asking this Court to consider an issue not raised on appeal. Bell filed no cross-appeal on the issue of liability nor argued in its brief to the Tenth Circuit that liability was so intertwined with damages that a reversal of the latter would necessarily mandate reversal of the former. The circuit courts of appeal treat those issues which the parties have not preserved for appeal as waived. *Watts v.*

United States, 220 F.2d 483, 485 (10th Cir. 1955), *cert. denied* 349 U.S. 939 (1955) ("There is a plethora of authority holding that a point not briefed or argued may be treated as waived"); *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191 (1937) ("In the absence of a cross-appeal" a party may not " 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.' . . . The rule is inveterate and certain.") cited in *Dawson v. Andrus*, 612 F.2d 1280, 1282 fn. 3 (10th Cir. 1980). No party to this suit has ever appealed or claimed as error the jury verdict that Bell was liable to CNA for contractual interference. In fact, Bell argued that "the judgment of the jury in this action should be affirmed." (brief of appellee, p. 50, 7-22-86).

Bell simply cannot assert – for the first time in a petition for rehearing of an appellate opinion – that the jury verdict for respondent should be reversed. *See Carr v. F.T.C.*, 302 F.2d 688 (1st Cir. 1962) (in denying a petition for rehearing, the First Circuit said: "This is not a case of a party caught in some manner by surprise. It is not even the case of indifferent counsel not versed in every branch of the law. . . . For a [party] . . . best familiar with his own practice with respect to a matter directly in issue, and now said to be of paramount importance, to make no mention of the subject until after he had lost the case on other grounds, if deliberate, is a breach of duty to the Court and, if inadvertent, is still inexcusable." *Id.* at 692.)

Even if Bell had timely urged error in the jury verdict for CNA, Bell would not be entitled to a reversal. As

stated by the Tenth Circuit, the evidence at trial was uncontroverted that Bell's tortious contractual interference caused CNA to lose insurance contracts with 143 cablelayers resulting in annual premium losses of more than $776,000.00.

> Southwestern Bell offered no testimony concerning cancellations that were unrelated to its actions. Whatever number of cancellations might theoretically be attributed to causes other than the damaging statements, the record fails to support defendant's argument.

Continental Casualty, supra p. 974. A retrial on the issue of damages only does not infringe on the Seventh Amendment right to a jury trial "unless the separate retrial on damages are so interwoven with the issues of liability already tried that it is unjust to try the damages separately". *See e.g. Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802 (3rd Cir. 1984) *cert. denied* 477 U.S. 908 (1986).

Finally, Bell argues that the Tenth Circuit erred when it "ordered a new trial limited to damages without even considering the possibility that the amount of damage award reflected a compromise verdict". (*Petition, supra* p. 12) and thus the Panel Opinion conflicts with *National R.R. Passenger Corp. v. Koch Industries, Inc.*, 701 F.2d 108 (10th Cir. Okl. 1983). This is a unique case which does not support Bell's argument.

> We would uphold an order of a new trial on damages **unless** the record clearly demonstrated a compromised judgment. [citations omitted]

Id. at 111 (emphasis added). In *National R.R. Passenger Corp.*, when both parties moved for a new trial, a magistrate sitting as a Special Master concluded that the jury had reached a compromise verdict and recommended a new trial on all issues. The trial court refused to accept the magistrate's recommendation and, consistent with plaintiff's motion, granted a new trial on damages only. On remand, the trial court was directed *to reconsider* its denial of defendant's motion for a new trial on both liability and damage issues because "before the district judge may reject the master's recommendation of a new trial on all issues he must review the transcript." *Id.* at 111. None of these special facts are present in this appeal. Here, the Panel Opinion was decided after a thorough review of all the trial transcripts.

Appellate courts clearly have the power to reverse a jury verdict for a retrial of the damage issue only. Fed. R. Civ. P. 59(a); *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 515, 51 S.Ct. 513, 515 (1931). As the Tenth Circuit found, Bell established no relationship between liability and damages. Liability and damages were separate issues. The jury was instructed "not [to] consider the question of whether the plaintiff has been damaged until you have first considered and decided the question of whether or not the defendant is liable". TR 1369. "With regard to the plaintiff's claim of intentional interference with contract rights" the jury finds "in favor of the plaintiff, Continental Casualty Company, and against defendant, Southwestern Bell . . . " TR 1383; *see also* (doc. 313, verdict, p. 1, 9-30-85).

> The jury's verdict was in two parts. The first was a finding in 'favor of the plaintiff and against the

> defendant.' The second was an award of 'general, special and compensatory damages.' Inherent in part 1 is a finding that the company was negligent. **There is no reason for relitigation of that question.**

Trejo v. Denver & R.G.R. Co., 568 F.2d 181, 184 (10th Cir. 1977) (emphasis added). Accordingly, the Panel Opinion does not threaten the uniformity of decisions issued among the circuits nor decide a question of exceptional importance.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

MICHAEL MINNIS*
DAVID MCCULLOUGH
1310 First Oklahoma Tower
210 West Park Avenue
Oklahoma City, OK 73102
(405) 235-7686
Attorneys for Continental Casualty Company

February 17, 1989

* Counsel of Record